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IN THE

Supreme Court of The United States

OCTOBER TERM, 1974

No. 74-370

IN THE MATTER OF JOHN E. GOODRICH,

Petitioner,

vs.

STATE OF SOUTH DAKOTA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the South Dakota Supreme Court was filed on April 2, 1974, and is reproduced in Appendix A of the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court should not be invoked under 28 USC §1257 and United States Supreme Court Rule 19 for the reason that the decision of the South Dakota Supreme Court is in complete accord with applicable decisions of this Court and for the further reason that the constitutional and statutory rights of the Petitioner have not been violated.

QUESTION PRESENTED

Were Petitioner's constitutional rights violated by his disbarment for appropriation to his own use of his client's trust funds in April, 1968, when said transaction was investigated by the Grievance Committee of the State Bar and the file closed on the matter by the State Attorney General's Office in August, 1970, and thereafter the State Supreme Court in January, 1972, directed the Attorney General to file a formal complaint against Petitioner for other alleged, and subsequently unproved, misconduct occurring in November, 1971, which said complaint also resurrected the April, 1968, transaction?

STATEMENT OF THE CASE

Respondent agrees generally with Petitioner's statement of the case, but not with the conclusions or interpreta-

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tions drawn from those facts. These specific points of difference are covered in the Argument.

ARGUMENT

Respondent disagrees that Petitioner was disbarred for misappropriating $1,900 from the **Defense Fund** in the Draper State Bank. It was instead the $1,900 from the **Special Bond Account** in the Lyman County Bank that ultimately was appropriated to Petitioner's personal use.

The South Dakota Supreme Court stated in its opinion that Petitioner procured $21,900 for the expressed purpose of paying off the $20,000 bond. A sum of $18,100 taken from the bond account and a sum of $1,900 taken from the **Defense Fund Account,** both in the form of cashier's checks, were in fact used to pay off the bond. The Petitioner, however, also received an additional $1,900 in cash from the **bond account** on the same day for the expresed purpose of paying off the bond, but instead appropriated that money to his personal use. (See page 7A of Appendix "A" of petition.) The misappopriated money was taken from the bond account and not from the defense fund. Whatever the source of the misappropriated money, however, there is no question but that Petitioner procured $21,900 for the single expressed purpose of paying off the bond, and thereafter appropriated $1,900 of that sum to his own use.

Petitioner states in his brief that he was disbarred on allegations not charged in the original complaint and, thus, was not given fair notice of the charges. This statement is not well founded. The original complaint, (reproduced in Appendix "D" of Petition) paragraph III, is entitled **Violation of Purpose of Trust.** In that paragraph, specific reference is

made to the fact that sums totaling $21,900 were withdrawn for bond purposes when in fact the bond was set at $20,000. Clearly, that paragraph put Petitioner on notice that he was to be held accountable in court for those discrepancies.

Contrary to the allegation made on page 3 of the Petition, the Petitioner was given full opportunity at the Referee's Hearing and again before the South Dakota Supreme Court to confront witnesses and present his case with regard to the alleged misuse of trust funds.

Finally, Petitioner argues that the resurrection of charges previously "dismissed" seventeen months earlier violates his constitutional rights. Under South Dakota statutes, only the Supreme Court is empowered to order the issuance of a formal complaint. Therefore, the Attorney General wrote the letter to the South Dakota Supreme Court (cited on page 11 of Petition) advising that further action would be taken only if there were specific directions to do so. The charge was "dismissed" only in the sense that the Attorney General's Office investigated the charges but was never given an order by the South Dakota Supreme Court to prepare a formal complaint against Petitioner at that time.

Later, however, another totally unrelated allegation of misconduct was lodged against Petitioner for his actions in a November, 1971, lawsuit, and it was then that the South Dakota Supreme Court asked that a formal complaint be drawn against Petitioner which should include "any other alleged unprofessional conduct of said attorney."

Thus Petitioner's main argument is that the inclusion in the complaint of the matter which had not been acted

upon for seventeen months so violated his constitutional rights that his disbarment was improper. Yet at no time does Petitioner present a valid argument as to how the mere passage of time has jeopardized his ability to defend himself or violated his constitutional rights. The only argument he makes is that the subsequent death of John Ferguson (the source of the $25,000 bond account) and the fact that his client, Dr. James Ferguson, had subsequently moved to Australia had totally deprived him of any chance to present a meaningful defense in his behalf. What is patently clear is that Petitioner never states how the presence of either John Ferguson or Dr. Ferguson at the hearing could have affected the findings of the court. In fact, Petitioner had at no time shown any intent or interest in bringing Dr. Ferguson back from Australia to testify in his behalf. The reason is obvious. The testimony of neither man could alter the fact that Petitioner misappropriated the $1,900. It is of little consequence also that "John Ferguson withdrew his complaint" (page 8 of Petition), once the misappropiation had been made. Further, Petitioner's statement that he was not "confronted with his accusers" is inaccurate in that he was personally confronted with every witness against him regarding the withdrawal of the $21,900 from the two accounts. Neither Dr. Ferguson nor John Ferguson was a necessary witness against him nor was either one used as a witness against him in any sense of the word in proving that allegation. And as was earlier stated, Petitioner at no time, not even in his Petition, has offered any explanation as to how the presence of either man could have helped in his defense on that charge.

Thus, the complaint fairly apprised the Petitioner of what he must defend against; he was confronted with all witnesses and given a fair and full hearing to dispute those

charges; and he has not shown how the mere passage of seventeen months time has in any way affected any of his constitutional rights. No challenge has been made to the constitutionality of any of the South Dakota statutes relating to disciplinary action against attorneys. No argument has been made that the South Dakota Supreme Court failed to follow and fully comply with all statutory requirements in this regard. Regardless of the outcome, this case will affect only the Petitioner, and will have no bearing or effect on other individuals or on statutory or case law. There are no conflicting decisions as this is a case of first impression before the South Dakota Supreme Court on a singular set of facts applicable only to Petitioner. Finally, and of course most significantly, the Petition should be denied for the reason that the decision below was clearly correct. Petitioner was not and has not been denied procedural due process nor has there been any denial of any of his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

KERMIT A. SANDE
Attorney General
State of South Dakota

MARVIN D. TRUHE
Assistant Attorney General
Counsel for Respondents

PROOF OF SERVICE

Marvin D. Truhe, one of the attorney's for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the _____ day of December, 1974, I served copies of the foregoing Respondent's Opposition to the Petition for a Writ of Certiorari upon Thomas J. Morris, Attorney at Law, 2060 North 14th Street, Arlington, Virginia, by mailing copies of such duly addressed to him with the proper postage prepaid.

MARVIN D. TRUHE, one of the
Attorneys for Respondent